

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY RATAJCZAK,

Defendant-Appellant.

UNPUBLISHED

January 13, 2005

No. 242715

Bay Circuit Court

LC No. 00-001225-FC

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant's convictions stem from the shooting death of defendant's housemate during the course of an argument. Defendant contended at trial that the gun went off accidentally when he flinched and, as a result, inadvertently pulled the trigger. We affirm.

Defendant first argues that the trial court erred when it denied his motion for a new trial. We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979).

Defendant based his new trial motion on the fact that the court allowed the jurors to examine and experiment during their deliberations with the rifle used to kill the victim. Defendant contends that when the jurors tested the amount of pressure needed to pull the rifle's trigger, they considered facts outside those introduced into evidence at trial. Thus, defendant asserts, his right to an impartial jury was denied in violation of the Sixth Amendment. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). We disagree.

The defendant bears the initial burden of proving (1) that "the jury was exposed to extraneous influences" and (2) that "these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Id.* at 88-89 (citations omitted). Regarding the latter part of the defendant's burden, our Supreme Court in *Budzyn* explained that "[g]enerally, . . . the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89 (citations omitted). If the defendant meets this initial

two-pronged burden, the burden shifts to the prosecutor to prove that the error was harmless beyond a reasonable doubt. *Id.*

We recently applied this test in *People v Fletcher*, 260 Mich App 531; 679 NW2d 127 (2004), a case factually similar to this one. The defendant in *Fletcher*, who was ultimately convicted of second-degree murder in the fatal shooting of his wife, argued at trial that she had accidentally shot herself. *Id.* at 539. The jurors in *Fletcher* allegedly attempted to reenact the events described at trial to determine whether the gun would land where it did if the victim had inflicted her own fatal wound.¹ *Id.* at 537, 539. Applying the *Budzyn* test, we determined that the jurors' experiment did not constitute an extraneous or external influence. *Id.* at 542-544. We reasoned that, unlike in *Budzyn*, the jurors in *Fletcher* "based their deliberations exclusively on the testimony elicited during the trial. . . . The reenactment was closely intertwined with the deliberative process and was not premised on anything other than the jurors' collective account of the evidence presented in open court." *Id.* at 542.

We noted as well that none of the jurors in the *Fletcher* case performed an experiment "outside the jury room or outside the presence of the other jurors." *Id.* at 543.

Instead, the jurors worked together throughout their deliberations to evaluate competing trial theories. . . . The jurors were free to consider and discuss any matter they believed important to the resolution of this case, including a discussion on where the gun should have landed if [the defendant's wife] shot herself. That one juror apparently simulated a fall off of a table in the jury room and dropped the gun during this simulation is simply an outgrowth of such mental hypothesizing. [*Id.*]

Like the jurors' experiment in *Fletcher*, the jury in the case at bar relied on the testimonial and physical evidence introduced at trial, including the rifle itself, to test the parties' competing arguments. This test was a natural "outgrowth" of the jurors' discussions regarding what they heard during the trial. See *id.* Accordingly, we find no error in the trial court's denial of defendant's motion for a new trial.

Defendant next argues that the prosecutor engaged in misconduct, thus depriving him of a fair trial. Specifically, defendant argues that the prosecution improperly appealed to the jurors' sympathy and misstated the law regarding misdemeanor arrest. Although framed as an issue of prosecutorial misconduct, defendant's assertion that the prosecutor made an improper appeal for sympathy is actually an evidentiary issue. The asserted improper appeal was allegedly accomplished by displaying for the jury a large photograph of the victim and the victim's bloody t-shirt. Because defendant failed to raise specific and timely objections at trial to either the introduction of this evidence or the prosecutor's handling of it, we review for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). We note that defendant has failed to adequately present this matter for our review by supporting

¹ We noted that the gun was properly admitted into evidence and properly provided to the jurors during their deliberations. *Fletcher, supra* at 537 n 3.

his argument with authority. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In any event, we conclude that this assertion of error is without merit. Defendant fails to establish that the two items were improperly admitted, or that any error in the handling of them could not have been cured by a cautionary instruction.

We also reject defendant's assertion that the prosecutor misstated the law regarding misdemeanor arrests. The prosecutor's implicit assertion that the police have the authority to arrest a person for a misdemeanor violation is clearly supported by statute. MCL 764.15(1)(d).

Defendant next argues that he was deprived of the effective assistance of counsel. Defendant bases his argument on his several alleged failures on the part of trial counsel. We see no merit in any of these alleged instances of error. Challenges to the effectiveness of trial counsel present mixed questions of fact and law that we review de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To show ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and that "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the burden of overcoming the strong presumption of effective assistance of counsel. *LeBlanc, supra* at 578, citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). An attorney's decisions regarding strategic matters are given deference by this Court. *Mitchell, supra* at 163; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant asserts that his attorney failed to produce evidence supporting defendant's theory that he shot Evans in self-defense. Specifically, defendant asserts that counsel failed to corroborate defendant's assertion that the victim had struck defendant on the chin during their argument. Defense counsel testified during a *Ginther*² hearing that he chose not to pursue information regarding this matter given defendant's own uncertainty regarding how he sustained that injury. Counsel also testified that once it became clear that the court was not going to instruct the jury on self-defense, he thought the more prudent strategy was to focus on his alternative theory that the shooting was an accident. We are satisfied that defense counsel's decision on this was a matter of trial strategy, which we will not second-guess on appeal. *Rockey, supra* at 76-77.

Defendant also argues that his attorney's performance was deficient because he failed to object to the court taking notice of landlord-tenant law. We reject this argument as well. A court is required by MRE 202(b) to take judicial notice of Michigan law where a party requests that it do so. *Koenig v South Haven*, 221 Mich App 711, 728; 562 NW2d 509 (1997), rev'd in part on other grounds 460 Mich 667 (1999). Here, the prosecutor requested that the court take judicial notice of the law, and the court did so in compliance with MRE 202(b). Thus, any objection by

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant would have been meritless. And an attorney is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Similarly, we reject defendant's assertion that counsel was ineffective for failing to object to alleged prosecutorial misconduct. As noted, defendant has not established that the prosecutor engaged in misconduct. Again, because counsel is not required to raise a meritless objection, *id.*, counsel's performance was not ineffective. Additionally, under the circumstances of this case, counsel also cannot be faulted for failing to attempt to have the jury instructed on misdemeanor arrest. *Id.*

We also reject defendant's assertion that counsel should have objected to the court's reinstruction of the jury on the defense of accident. When reinstructing the jury, the court gave an instruction based on CJI2d 7.3a. Defendant argues that any instruction should have been modeled on CJI2d 7.2. However, CJI2d 7.2 would not have been appropriate given that defendant did not contend that the firing of the rifle was voluntary. Indeed, he argued at trial that it was an involuntary act caused when he flinched.

Finally, defendant argues that the court erred in determining his sentence based on its erroneous scoring of offense variables (OV) 7 and 9. We disagree. Sentencing issues are reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). A sentence within the statutory guidelines must be affirmed on appeal unless the trial court relied on inaccurate information or otherwise erred in calculating the defendant's guidelines score. MCL 769.34(10). "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

Defendant acknowledges that his minimum sentence for his conviction of second-degree murder was within the guidelines. And we are satisfied that the court did not err in scoring these offense variables. We also reject defendant's argument that the judge's scoring of the offense variables violated his constitutional rights as announced in *Blakely v Washington*, ___ US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). See *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). Nor do we find the standards under OV 9 to be unconstitutionally vague.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio